1969

First Security Bank of Utah, National Association v. Ezra C. Lundahl, Inc., E. Cordell Lundahl, Shyrleen B. Lundahl, Ezra C. Lundahl and Leatha A. Lundahl : Petition For Rehearing

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Olson and Hoggan and Ray, Quinney, and Nebeker; Attorneys for Plaintiff-Respondent

In the Supreme Court
of the State of Utah

FIRST SECURITY BANK OF
UTAH, NATIONAL ASSOCIATION,
Plaintiff and Respondent,

vs.

EZRA C. LUNDAHL, INC., E. COR
DELL LUNDAHL, SHRYLEEN
LUNDAHL, EZRA C. LUNDAHL
LEATHA A. LUNDAHL,
Defendants and Appel

PETITION FOR

BRIEF OF PE

Petition of First Security Bank
of Supreme Court Decisio

Char
of
Don
of
Att
56 W
Log
and
400
Sal

Walter C. Mann
of Mann and Hadfield,
Attorneys for Lundahl
Suite 35
First Security Bank Building
Brigham City, Utah

TABLE OF CONTENTS

CASES CITED

AUTHORITIES CITED

STATUTES CITED

In the Supreme Court
of the State of Utah

FIRST SECURITY BANK OF UTAH, NATIONAL ASSOCIATION,
Plaintiff and Respondent,

vs.

EZRA C. LUNDAHL, INC., E. CORDELL LUNDAHL, SHRYLEEN B. LUNDAHL, EZRA C. LUNDAHL and LEATHA A. LUNDAHL,
Defendants and Appellants.

Civil No. 11359

PETITION FOR REHEARING

Plaintiff-Respondent petitions the above-entitled Court pursuant to Rule 76(e)(1), U. R. C. P., for a rehearing in the above entitled matter on the decision of this Court filed May 20, 1969, upon the following points wherein it is alleged that the Court has erred:

POINT I: The Supreme Court in basing its decision holding the bank had lost its right to charge back on Section 70A-4-212(1) and the jury finding that the bank was negligent, failed to consider and pass on the effect of Section 70A-4-212(4) that the bank's right to

charge back is not affected by failure of the bank to exercise ordinary care, and the official comment thereto that irrespective of the cause of the non-payment and of the person ultimately liable for non-payment, charge back is permitted, even where non-payment results from the bank's negligence, the remedy being in damages.

POINT II: The Supreme Court in passing on the fullness of the accord and satisfaction misconstrued Lundahl's position and testimony, holding that it included "the obligation in controversy," when actually Lundahl maintained throughout the trial and in their brief to this Court (page 5 of Appellant's Brief) that the fact that the $8,100.00 check was unpaid was not known by the Lundahls, and the settled law appears to be that an accord and satisfaction can cover only items on which there is a meeting of the minds.

STATEMENT OF THE NATURE OF THE CASE

This is a Petition for rehearing filed by Plaintiff-respondent on a decision of the Supreme Court filed May 20, 1969.

DISPOSITION IN PRIOR DECISION

In its May 20, 1969 decision, the Supreme Court reversed the judgment of the lower court in Plaintiff's favor and affirmed the judgment of the lower court in Defendant's favor.

RELIEF SOUGHT ON REHEARING

Plaintiff-Respondent seeks a rehearing on the decision of May 20, 1969, and an ultimate affirmance of the lower court's judgment.

STATEMENT OF FACTS

No restatement of the facts is necessary, except to point up again that the Lundahls maintained in their testimony during trial and in their brief on appeal that they were not aware that the $8,100.00 check (the one in controversy) had not been paid until sometime in February, 1967, which was about six weeks after the accord and satisfaction on January 4, 1967, which the Supreme Court held in its decision settled and compromised "all accounts" between Lundahl and the Bank.

STATEMENT OF POINTS

POINT I: The Supreme Court, in basing its decision holding the bank had lost its right to charge back on Section 70A-4-212(1) and the jury finding that the bank was negligent, failed to consider and pass on the effect of Section 70A-4-212(4) that the bank's right to charge back is not affected by failure of the bank to exercise ordinary care, and the official comment thereto that irrespective of the cause of the non-payment and of the person ultimately liable for non-payment, charge back is permitted, even where non-payment results from the bank's negligence, the remedy being in damages.

POINT II: The Supreme Court in passing on the fullness of the accord and satisfaction misconstrued Lundahl's position and testimony, holding that it included "the obligation in controversy," when actually Lundahl maintained throughout the trial and in their brief to this Court (page 5 of Appellant's Brief) that the fact that the $8,100.00 check was unpaid was not known by the Lundahls, and the settled law appears to be that an accord and satisfaction can cover only items on which there is a meeting of the minds.

ARGUMENT

POINT I

The Supreme Court, in basing its decision holding the bank had lost its right to charge back on Section 70A-4-212(1) and the jury finding that the bank was negligent, failed to consider and pass on the effect of Section 70A-4-212(4) that the bank's right to charge back is not affected by failure of the bank to exercise ordinary care, and the official comment thereto that irrespective of the cause of the non-payment and of the person ultimately liable for non-payment, charge back is permitted, even where non-payment results from the bank's negligence, the remedy being in damages.

This Court, in holding that the bank had lost its right to charge back the Lundahl account and was at

said time no longer an agent for its depositor, Lundahl, stated:

> "However, this (the agency) presupposes that the bank acts in accordance with its duty imposed by law; and this requires presentation to the payor bank in the due course of business, and if the check is dishonored, notice to its depositor by its midnight deadline or within a longer reasonable time under the circumstances. Sec. 70A-4-212(1), U. C. A., 1953. If there is a substantial failure of the bank to perform this duty, it loses its right of charge-back. Sec. 70A-4-212, U. C. A., 1953.

This Court then recites the jury finding that the bank was negligent in failing to give notice.

Petitioner asserts that this Court has done some selective application of a portion of Section 70A-4-212, resulting in an unwarranted exclusion of other equally important portions of said Section.

This Court singles out and applies subsection (1) of 70A-4-212. It apparently has inadvertently failed to consider, or if considered, for some reason failed to comment on, subsection (4) which plainly states:

> "The right to charge back is not affected by
> (a) Prior use of the credit given for the item; or
> (b) Failure of the bank to exercise ordinary care with respect to the item, but any bank so failing remains liable."

This seems to state unequivocably that negligence does not prevent or preclude charge-back, nor cause the bank to lose its right to charge back.

The question then arises, what does the bank remain liable for?

This is answered in the comments to the Section from the 1962 official text of the National Conference of Commissioners on Uniform State Laws:

> Comment 5: "The rule of subsection (4) relating to charge-back (as distinguished from claim for refund) applies irrespective of the cause of the non-payment, and of the person ultimately liable for non-payment. Thus, charge-back is permitted even where non-payment results from the depositary bank's own negligence.
>
> Any other rule would result in litigation based upon a claim for wrongful dishonor of other checks of the customer, with potential damages far in excess of the amount of the item. Any other rule would require a bank to determine difficult questions of fact. The customer's protection is found in the general obligation of good faith (Sections 1-203 and 4-103). If bad faith is established the customer's recovery "includes other damages, if any, suffered by the party as a proximate consequence." (Section 4-103(5); see also Section 4-402)." Section 4-103(5) cited above, (which is 70A-4-103

(5) U. C. A. 1953) provides for the computation of damages against a party who has failed to use ordinary care in handling an item.

This subsection provides:

> (5) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not

> have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

The question of the amount of damages to Lundahl was submitted to the jury by the lower court, along with the question of due care, in question Number 3, as follows:

> "If you make a finding in answer to the previous question, then here consider the question of damage and award the Defendant such damage, if any you find, as was proximately caused by the Plaintiff's omission, if any you find."
> The jury answered:
>
> "We, the jury, find the amount of $893.93 which was taken by the bank from the account of Lundahls, Inc to be awarded to the Defendants."

It is the bank's position that the bank, as Plaintiff, specifically, and the banking industry, as an important element of our society, in general, is entitled to have a full interpretation of the applicable portions of the new commercial code given them by this Court.

Of paramount importance is the question as to whether subsection (1) of 70A-4-212 is exclusively applicable, or whether or not subsection (4) has some applicability, and if not, why not, and if so, to what extent.

If subsection (4) is of equal dignity with subsection (1), then the Lundahls remedy is in damages under

Section 70A-4-103(5). The jury found these damages to be $893.93.

Thus. if as Subsection (4) clearly says, the bank's failure to exercise ordinary care does not affect its right to charge-back the item, but leaves it liable for damages, the bank was entitled to charge-back the item of $8,100.00 and respond in damages for its failure to exercise ordinary care, in the sum of $893.93, as fixed by the jury. This is exactly what the lower court did.

Petitioner calls the Court's attention to the portion of its decision which states:

> "But when a party has demanded a trial by jury he is entitled to have the jury find the facts, and it is not the trial court's prerogative to make findings inconsistent therewith and thereby defeat the effect of the jury's findings."

Petitioner respectfully submits that this rule should apply to all of the jury's findings, including the finding on the amount of damages suffered by Lundahls, because the effect of this Court's decision in selectively applying only subsection (1) of 70A-4-212 to this case and sidestepping subsection (4) thereof, is to make a finding that Lundahl suffered damages of $8,100.00 by the bank's failure to exercise ordinary care, whereas the jury found these damages to be only $893.93.

Petitioner further points out that this Court's de-

cision emphatically pointed up the jury's findings of negligence and on accord and satisfaction, questions 1, 2 and 4 and the answers thereto, all being favorable to Lundahl, but did not in any respect even mention question 3 and its answer, which was not favorable to Lundahl. The inviolate position afforded by this Court with respect to three of the jury's answers should also be afforded to the answer to question three, and it is respectfully suggested that this Court should not ignore it nor modify it.

The Uniform Commercial Code is now in the same position as was the Uniform Negotiable Instrument law about a half century ago. Court interpretations of the law are, in Petitioner's opinion, not only of vital importance to the specific litigants involved, but to the commercial world in general. Petitioner thinks that attorneys. bankers, educators, judges and businessmen everywhere are interested in cases, wherever decided, interpreting the code. These interpretations over the years certainly will be of benefit as guides for future conduct of business and in commercial transactions involving the code. These benefits, it would seem, warrant a close scrutiny of the language of the code and a determination of its applicability.

Specifically, if Subsection (4) of 70A-4-212 does not mean what it says and should not be read in conjunction with the other provisions of 212, Petitioner

asserts that reason should be given for such isolation.

And, if Subsection (4) is applicable, and the depositor's remedy is in damages for the bank's failure to use ordinary care, then Petitioner claims the benefit of it, and since the jury has spoken on the amount of damage involved, this amount should be accepted by this court and not modified.

ARGUMENT

POINT II

The Supreme Court in passing on the fullness of the accord and satisfaction misconstrued Lundahl's position and testimony, holding that it included "the obligation in controversy," when actually Lundahl maintained throughout the trial and in their brief to this Court (page 5 of Appellant's Brief) that the fact that the $8,100.00 check was unpaid was not known by the Lundahls, and the settled law appears to be that an accord and satisfaction can cover only items on which there is a meeting of the minds.

This Court apparently construed Lundahl's position and testimony to be that the accord and satisfaction of January 4, 1967, included the obligation in controversy.

Actually, if Petitioner reads the Lundahl testimony (Tr. 105) and contention made in their Appellant's Brief, page 5, correctly it is their position that they

did not know the item involved was unpaid at the time of the accord and satisfaction.

If Lundahl's testimony and contention is accepted by this Court, that they were unaware of the outstanding item at the time of the January 4, 1967 accord and satisfaction, and if this Court holds to its decision that the accord and satisfaction covered the "unknown" item, the law in Utah would appear to be that an accord and satisfaction requires no meeting of the minds on the subject matter, but is more in the nature of a release of all claims, known or unknown.

This certainly would be contrary to established law on the subject.

The accord in an agreement. Fairchild vs. Mathews, (Idaho, 1966) 415 P(2d) 43.

The general essentials of accord are set forth in 1 Am. Jur. (2d), Accord and Satisfaction Section 4, page 304 as follows:

> The discharge of claims by way of accord and satisfaction is dependent upon a contract express or implied; there can be no accord and satisfaction without making of a new contract, one independent of and additional to the source, contractual or otherwise, of the disputed claim or claims. The essentials to a valid contract generally must be present. It must appear that there is a proper subject matter, that the parties thereto were competent to contract with each other, that there was consent or a meeting of the minds of the parties, and that the

agreement was supported by a sufficient consideration. A claim is not discharged if the purported accord and satisfaction violates the law.

Without belaboring the point, it is most difficult to understand how an accord can cover an unknown item.

CONCLUSION

Petitioner respectfully asks this Court to grant a rehearing in this matter, and upon such rehearing, affirm the judgment of the trial court, or in the alternative, if this Court feels that the case as now presented is cluttered up with too many extraneous facts, to grant a new trial with limitations or instructions as to the scope thereof.

OLSON & HOGGAN

By .....
Charles P. Olson

RAY, QUINNEY & NEBEKER

By .....
Don B. Allen

Attorneys for Petitioner